

In the Matter of License Number 241187 and Merchant Mariner's
Document No. Z-1310112-D2

Issued to: JAMES CARL SCHEPIS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1337

JAMES CARL SCHEPIS

This appeal is taken in accordance with Title 46 United States
Code Section 239 (g) and Title 46 Code of Federal Regulations
Section 137. 11-1.

By order dated 11 October 1960, an Examiner of the United
States Coast Guard at New York City, New York, suspended for a
period of six months License Number 241187, Merchant Mariner's
Document Number Z-310112-D2 and all other valid licenses and/or
documents issued to James Carl Schepis upon finding him guilty of
Negligence under a specification reading, in part:

****negligently navigate the said vessel off the coast of
Nova Scotia at an immoderate speed under conditions of
fog and restricted visibility, thereby contributing to
the collision between the SS HURRICANE and the trawler
LAURA ELLEN."

Operation of such suspension however was conditioned upon
Appellant's conviction on any other charge under 46 U.S. Code 239
within a period of twelve (12) months.

At the hearing in this matter, Appellant, who was represented
by Counsel of his own choice, entered a plea of not guilty.
Thereupon, the Examiner heard testimony, summation, argument and
citation of authority. No proposed findings, conclusions or
memoranda were submitted. Subsequently, the Examiner published his
decision concluding that the charge was proved.

Based upon my examination of the record, I hereby reject none
of the Findings of the Examiner, adopt those mentioned herein and
find as additional facts, all observations under the heading:

FINDINGS OF FACT

On 25 April 1960 during a fog condition, Appellant was serving
on board the American SS HURRICANE, as Master under authority of his
license, in the vicinity between Nova Scotia and Sable Island, when

such ship came into collision with and sank the Canadian trawler LAURA ELLEN. All persons aboard the trawler were subsequently picked out of the water by the HURRICANE.

At the time of the event, the HURRICANE (steam screw, C-2 cargo, 438.9 x 63.1 x 27.7) was enroute from Texas to Montreal, steering a course between Nova Scotia and Sable Island.

At 0217 visibility dropped to about three miles because of fog whereupon the Third Mate, under standing instructions for such occasions, placed the engine, then making good about 17-18 knots, on STAND-BY. Fog signals, which were continued throughout the event, were also started at that time. The Third Mate then notified the Appellant in his quarters by telephone of such reduced visibility and of placing the engine on STAND-BY. The Appellant, in reply, requested to be kept informed of any further decrease in visibility requiring a reduction in speed.

Twenty-three minutes later, the same watch officer again spoke to the Appellant by telephone advising him that fog had set in. Again in reply, the Appellant instructed the watch officer to reduce the engine to 60 R.P.M's. Thereafter and under such conditions the Appellant was on the bridge.

Later and shortly before 0400, the Second Mate came to the bridge to relieve the Third Mate in regular course. Visibility at that time was 400 feet.

At about 0420, under such conditions, the Appellant went below for another coat leaving no instructions as to speed. The record does not indicate whether the watch officer was aware of the Appellant's departure.

At 0434, the forward lookout advised the watch officer of a boat off the starboard bow. The engine telegraph was placed on STOP and the mate attempted to put in a telephone call to the Appellant who upon, hearing the telephone, went to the bridge without answering.

Before the Appellant got to the bridge, however, the forward lookout advised that the HURRICANE had struck the other vessel. At that moment, the Appellant came into the pilot house. No helm orders were given before or immediately after the collision. Visibility at that time was 350 feet.

The other vessel, when first sighted by the forward lookout, was one and one-half points off the starboard bow crossing from right to left at a distance of about two or three hundred feet showing no light, sounding no signal and unattended by a lookout.

The collision occurred in daylight. The speed of the HURRICANE at 60 R.P.M's, as testified to, was 6 knots.

Appellant, having joined the HURRICANE nine days prior to the collision, never attempted to 'Crash stop' the HURRICANE from a speed of 60 R.P.M's but estimated that it could have been stopped in two ship lengths. Log entries indicate that the engine order after the Stop signal rung-up at the time of the collision, was Full Ahead to begin a search for survivors.

The HURRICANE passed beyond the point of collision by about four times her own length or about 1755 feet before coming to a stop.

Appellant has no prior record and appeals from the order herein.

BASIS OF APPEAL

The contentions on behalf of the Appellant, as understood here, are:

POINT I

That the evidence and the specific findings of the Examiner fail to support the charge.

Argument in such connection is that six knots speed cannot be said to have contributed to the collision because the faults of the other vessel:

- (1) displaying no lights,
- (2) sounding no fog signals
- (3) being provided with no lookout, and
- (4) with the sole person above deck at the wheel either dozing or inattentive

were so critical, that the Examiner should have stated explicitly those items of negligence contributing to the collision which are chargeable to Appellant.

POINT II

That the Examiner applied an incorrect standard of 'moderate speed' because the formula advanced by the Investigating Officer and applied by the Hearing

Examiner, defining moderate speed in fog as: That which can be brought to a stop in half the visible distance ahead, is inapplicable because:

- (1) The other vessel, by failing to show a light or sound a signal deprived the Appellant of the distance that he could have 'seen' ahead if assisted by lights and sounds lawfully to be expected of the other vessel, and because
- (2) the formula used is applicable only in 'congested waters' and not in a "completely empty and untravelled part of the ocean".

POINT III

That the undisputed evidence of the HURRICANE's lookout conclusively demonstrates that if the other vessel had a competent lookout she could have avoided collision by a hard right or hard left turn.

POINT IV

That the Examiner erred in failing to follow the 'Major-minor' fault rule as a measure of reliable, probative and substantial evidence.

POINT V

That the six months' suspension was unduly harsh because of the good rescue operations by Appellant; and because no disciplinary action was taken against the mate on watch.

APPEARANCES

Messrs. Dorr, Cooper & Hays
260 California Street, San Francisco, California
By: Charles W. Kennedy, Esq., on Appeal.

OPINION

Appellant's contentions will be taken up in order somewhat different from that set out above.

ITEM ONE

Application of the Major-Minor Fault Doctrine here would be inappropriate.

On appeal, contention is made for the first time that the Major-Minor Fault Doctrine should have been employed by the Examiner in order to properly take into account the perilous faults of the other vessel. Application of such doctrine, it is claimed, would have spared the HURRICANE's conduct of anything more than superficial examination, thereby exonerating the Appellant.

There is no reason to apply such doctrine here since its application is reserved for those matters where the respective degrees of negligence are so contrasting as to recommend excusing the relatively innocent 'party' as in a civil litigation where the owners are responding in civil damages. Ever since its earliest pronouncements by the Supreme Court in the City of New York 147

U.S. 72, the Ludvig Holberg, 157 U.S. 60 and the Umbria 166 U.S. 404, the doctrine seems to have been applied only in disputes over civil responsibility arising out of matters of collision.

As to applying the doctrine here, Counsel offers no authority or reason except those already mentioned and that it should be "doubly applicable * * * where irreplaceable rights to a livelihood * * * are at stake". Since Counsel has offered no authority for applying the doctrine, it seems that the converse of the proposition is true because we are dealing with the conduct of a man acting under authority of a license whose professional actions are under examination. His responsibility must be determined however wrong the other party to the collision may have been.

ITEM TWO

Here, Counsel contends that the undisputed evidence "conclusively demonstrates" that if the other vessel had any sort of lookout she "would have been able to avoid collision by a hard right or hard left turn".

Such contention is based on testimony of the forward lookout and is, in its entirety, as follows:

"Q. At the time that you first saw the fishing vessel and in your experience, could the fishing vessel have done anything other than what she did to avoid collision?"

"A. I believe she could have. If she had given a hard right or hard left turn she would have missed our vessel." (R., pg 29)

There followed an objection and a voir dire after which the Examiner received such answer not as 'expert opinion' but as the testimony of an 'experienced man' and apparently rejected it for consideration as the sole cause of the collision which the Examiner was free to do:

"The weight to be given to opinion evidence is within the bounds of reason, entirely a question for the determination of the jury * * * or other trier of the facts * * * opinion evidence is not conclusive, even though uncontroverted and unanimous." Vol. 32, Corpus Juris Secundum: Evidence § 567 and cases cited.

Such testimony was not accepted as the opinion of an expert. Since there is no material in the record as to the characteristics

of the trawler upon which an independent determination as to its maneuverability could have been based, there is no reason to disagree with the Examiner's failure to accept such testimony.

ITEM THREE

Counsel contends, that in any event, the six months' suspension was unduly harsh even though the suspension was conditional. The reasons advanced in support of such contention are both immaterial.

The Appellant's duty to stand-by and to rescue if possible and necessary under the circumstances, is set out in 33 USC § 367 and 46 USC § 728 both of which carry sanctions. Such efforts are expected to be both timely and skillful of course.

That no action may have been taken against the mate on watch is immaterial as the conduct of each license holder is examined and determined individually.

ITEM FOUR

The matter of the HURRICANE's speed and the other vessel's failure to sound a fog signal will be considered here together as they involve common elements.

Appellant contends that the speed of the HURRICANE, even if it did not permit the ship to be stopped in half the visible distance ahead, was not excessive; the Hearing Examiner employed an incorrect formula for defining moderate speed in fog because the formula used is for 'congested waters' whereas another formula, one for the 'high seas' should have been employed. Upon an analysis of the cases cited by Counsel, such variation fails to materialize.

The Potter-William F. Humphrey, 1939 A.M.C. 382, is cited by Counsel for the proposition that knowledge of the presence of another vessel, as made known by its fog signal, is a crucial element in defining moderate speed in fog. However, the case does not justify this conclusion because it was not concerned with a situation where whistles were not heard. Both vessels heard signals and acted upon them.

The Polarusoil-Sandefjord, 236 F2 270, 2 Cir., 1956 was also referred to by Counsel. In view of the Polarusoil's reducing speed on encountering fog, stopping engines on hearing the first fog signal and being dead in the water at the time of impact, the Circuit Court affirmed the findings of sole responsibility on the part of the Sandefjord. The point of the case is not, as it would appear from Counsel's argument, that the Polarusoil was exonerated

for having a history of 'six knots in fog on the high seas', but because the vessel was stopped before collision the Sandefjord was condemned for a speed of twelve knots and for failing to stop engines on hearing the first signal.

On appeal counsel cites the Gertrude Parker Inc. v. Abrams, 178 F2 259, 1 Cir., 1949, pointing out that the vessel exonerated there in a fog collision had begun sounding signals and reduced speed to '5 to 6 knots' upon entering the fog --- the exact conduct of the Appellant here; and that the vessel condemned failed to sound signals until just before the collision. Hence, Counsel argues, that since the Court failed to condemn the other vessel, another test, one requiring a whistle ahead, applies; and since the Appellant here had no knowledge of another vessel in the vicinity, he was not in violation of the rule.

On analysis however, the Gertrude Parker case is somewhat different from the use made of it by Counsel on appeal. Actually, the Court was refusing to condemn the 'minor vessel' in a Major-Minor fault situation stating:

"* * * Since the Gertrude Parker's conceded faults were gross, we are not called upon to scrutinize the Skilligolee's conduct minutely, or draw doubtful inferences against her, to discover if she also may not have been at fault. * * *"

Additionally, the 5-6 knots mentioned in the Gertrude Parker case cannot be taken as a rule of moderate speed for all ships as Counsel's argument somewhat infers. Such speed by a fishing boat is a matter entirely different from such speed by a C-2 cargo ship.

Counsel on appeal further argues that the existence of such 'other formula' is tacitly recognized by the Rule itself. In such connection Counsel writes:

"* * * by the command of the second paragraph of Rule 16 requiring every steam vessel to stop engines upon hearing forward of the beam the fog signals of a vessel whose position is not ascertained. Obviously, if every vessel was proceeding at a speed permitting her to stop within the limit of her visibility, no further requirement of stopping engines would be practical or necessary. However on the high seas, the quoted rule has a practical and beneficial effect, assuming, of course that, unlike the situation here, both vessels are complying with the international rules providing for the sounding of

fog signals." (Brief on Appeal, Page 5)

Such interpretation of the rule completely disregards the numerous silent hazards upon which a ship may sail in fog but could otherwise avoid absolutely if the 'one-half the visible distance' rule was followed uniformly.

"The failure of vessels, in foggy weather to hear each other's signals is recognized as a common occurrence in collision cases. * * * (Citing cases)" Page 466, 18 F. Supp.: The Catalina, S.D. of Calif., 1937.

The Bolivia, 49 F 169, 2 Cir., 1891, which concerns a collision 20 miles off Fire Island, discusses the very proposition suggested by Counsel. Using the Court's own language, the proposition discussed by the court was:

"* * * if she had been provided with and had properly used such a fog-horn as the statute prescribes, the steam-ship would have been notified of her proximity and could have reduced her speed to the lowest rate consistent with her ability to control herself efficiently in a moment of peril".

The Court, although comprehending the suggestion of what would have happened if the other vessel behaved properly and made its presence known, nevertheless condemned both vessels.

The facts of the case are that the Bolivia, an iron steam ship, reduced speed from 11 knots to 7-8 knots upon entering fog which would allow her to stop in three times her length about 1200 feet if the stop and reverse orders were executed immediately. The schooner was first seen when she was some 300-400 feet away. Although both vessels were sounding fog signals, the schooner failed to make her signal heard. The Court stated:

"The steam-ship must also be held in fault because she was not going at a moderate speed in the fog, under the special circumstances and conditions of the case. * * * Under the existing state of the fog, and exercising the best vigilance, she could not discover another vessel more than 300 or 400 feet away, yet maintained such speed that, after reversing, her headway through the water could not be stopped within three times that distance. The locality was one frequented by numerous vessels in the coasting trade, and lay in one of the paths of the ocean traffic between Europe and the principal

commercial port of this country. * * * The rule is firmly established in this country, and also in England, that the speed of a steam ship is not moderate, at least in localities where there is a likelihood of meeting other vessels, if it is such that she cannot reverse her engines and be brought to a stand-still within the condition of fog, she can discover another vessel. * * *

Thus, the requirement to observe the two rules (moderate speed and stopping upon hearing signals ahead) side by side on the high seas is clear. See the Linus S. Eldridge, 77 F. Supp. 846, D.C. Mass., 1948 where a 77 foot fishing vessel, having just completed a drag, was stopped in the water described by the Court as 'high seas' (Georges Bank) while her crew was tending fishing gear or opening scallops. The Court found that the Eldridge had not sounded its fog signal for more than two minutes prior to the collision. Visibility at the time was limited to 50 yards. A similar vessel, the Mary E. D'Eon, came through the fog at six or seven miles per hour and upon sighting the Eldridge some 50 yards distant managed to reduce speed and to haul off sufficiently so as to inflict only a glancing blow.

The Court found the Eldridge at fault for failing to sound fog signals and it also found the Mary E. D'Eon at fault for immoderate speed saying:

"I find that the Mary E. D'Eon was violating Article 16 in that six or seven miles per hour was an excessive speed under the circumstances; than this fault was also a cause of the collision since she could have avoided the collision if she were proceeding at a moderate rate of speed despite the failure of the Linus S. Eldridge to give signals. The Mary E. D'Eon is not relieved of her negligence because the Eldridge was at fault."

In summary, the court have determined, regardless of whether or not another ship's signal has been heard, that what constitutes moderate speed in fog is related to the distance of visibility. This relationship has been considered in cases pertaining to ocean shipping lanes, and to areas frequented by fishing vessels as in this appeal.

ITEM FIVE

Among those various faults of the other vessel which could not have brought about the collision, Counsel includes failure to show a light.

Such contention does not appear to require consideration as it has no relationship to the cause. The collision occurred in daylight which would have absorbed the lights of the other vessel or at least would have rendered them pointless.

In this contention the forward lookout testified on cross-examination by Appellant's Counsel that at 0400 hours he answered the bell sounded from the bridge which routine also requires his reporting on the condition of his ship's lights as observed from the fo'castle head, saying:

"Q. On the morning of this collision, were the lights of the HURRICANE burning brightly, sir, as far as you could see?"

"A. I can't answer that because it was too light. I can't recollect seeing whether our lights are burning properly or not." (R., pg 27)

If there was too much daylight to report on his own light at 0400 hours, the same condition presumably prevailed with respect to the other ship's lights thirty-four minutes later at the time of the collision.

ITEM SIX

Appellant contends that the situation here was created chiefly by the many faults of the other vessel and that under the circumstances, the Hearing Examiner should have clearly stated the items of negligence chargeable to Appellant which contributed to the collision. There is no need for such an itemization for the various reasons indicated in the above discussion of these alleged faults of the trawler. Regardless of the latter, the collision could have been prevented by stopping the HURRICANE before reaching the trawler after first sighting her if Appellant had prudently controlled the speed of the HURRICANE.

CONCLUSION

Considering all the circumstances of this case, particularly that the HURRICANE was in waters where there was some likelihood of meeting fishing vessels and that she required more than twice the visible distance in which to stop, it is concluded that Appellant failed to navigate at a moderate speed. The order entered herein by the Hearing Examiner was justified notwithstanding any fault or neglect of which the other vessel may have been guilty.

ORDER

The order of the Examiner dated New York, New York, 11 October 1960 is AFFIRMED

E. J. Roland
Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 6th day of September, 1962.